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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 910

A. J. SIMLER,
Petitioner,

VERSUS

LESLIE L. CONNER and PHILLIPS PETROLEUM COMPANY, a corporation,
Respondents.

PETITION FOR REHEARING

JOHN B. OGDEN
1408 Liberty Bank Building
Oklahoma City, Oklahoma
Attorney for Petitioner

March, 1966

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-6750

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This petitioner respectfully requests this Court to reconsider its Order entered herein on the 28th day of February 1966, denying the Petition for Writ of Certiorari in the above captioned case; and for reasons and grounds for this petition shows to this Honorable Court, as follows:

STATEMENT OF FACTS

This is a suit between A. J. Simler, formerly a client of Leslie L. Conner, seeking a declaratory judgment for the purpose of determining what is a reasonable attorney's fee. The petitioner paid the respondent, Leslie L. Conner, $74,000.00 in cash. This controversy has heretofore been before this Court. See *Simler* v. *Conner,* 83 S.Ct. 609, 372 U.S. 221, 9 L.Ed.2d 691.

I.

The petitioner waived a jury trial relying upon the pre-trial agreement. The trial court, we think, failed to follow the requirements of the pre-trial agreement and proceedings and fixed an attorney's fee in the amount of $290,975.59. This attorney's fee is payable out of 36 per cent of the oil production from the property involved. The pre-trial agreement provided as heretofore pointed out in the Petition for Writ of Certiorari herein, that the court would fix a reasonable attorney's fee, in money, and said agreement must be construed to mean money to be paid upon the rendition of the judgment. The case as cited in the Petition for Writ of Certiorari herein, we think, holds that if this pre-trial agreement and order is not sufficiently definite for a trial, then it should be vacated. See *Plastino* v. *Mills,* 236 F.2d, page 32.

The pre-trial order crystallizing the issues of law and fact is binding upon the parties and upon the court. See *Montgomery Ward and Company* v. *Northern Pacific Terminal Company,* 128 F.Supp. 520, in which the Court said:

> "* * * It is objected that the Federal Rules of Civil Procedure, 28 U.S.C.A., do not require the statement of a cause of action, and therefore plaintiff is not bound by his theory of the case. If this position is sound, court proceedings are reduced to irrationality. In any event, this Court directed that a pre-trial conference be held here to 'simplify the issues.' The definitive order, heretofore entered, crystalized the contentions of law and fact, and the simplified issues were based thereon. The pre-trial order was adopted to prevent appellate courts from writing essays about theories of

law and circumstances of fact not involved in the case. The order is not only binding on the higher courts, but is also binding upon this Court and the parties, and specfically upon plaintiff. * * *"

In *Clark* v. *United States,* D.C., 13 F.R.D. 342, 345, the Court said:

> "When a plaintiff has by his counsel advised the Court and defendant of the theories upon which he relies and has given account of these, then the Court should not adopt some other theory of recovery, even if it should be believed that such a theory was more applicable."

The petitioner feels that this Court should so decide in this case and fix the binding effect of a pre-trial order upon the Judge, and petitioner feels that beyond a question of a doubt, his constitutional rights have been violated in that he has been denied due process of law.

II.

Petitioner respectfully requests the Court to review the testimony offered by MR. EDINGER, a witness offered by the Respondent, Mr. Leslie L. Conner. The witness Edinger stated that he thought the property might or may produce in the next twenty some odd years, oil of the value of $779,480.00. Apparently the Trial Judge took 36 per cent of this amount and fixed that as the attorney fee. The same witness testified that this property on the market was not worth in excess of $250,000.00. If the court had used the 36 per cent of $250,000.00 instead of 36 per cent of $779,480.00, the judgment would have at least been par-

tially based upon competent evidence; so the judgment is based on conjecture, uncertainty, and incompetent evidence and an opinion as to what this property will produce in the next twenty or thirty years; and the property is now burdened with a lien for $290,975.59, which is $40,973.59 more than the property can be sold for on the market today. The judgment is absolutely void for uncertainty. If the property quits producing tomorrow, the judgment would end at that time. If it produces at the same rate as it now produces and oil remains at the same price as the present market, it would take more than twenty years before the petitioner can rid himself of this judgment. This is a denial of due process of law and we call the Court's attention to C.J.S. Volume 49, page 159, Article 76.

In addition to the injustice of fixing the percentage on a speculative amount, the judgment burdens the property until the judgment is paid in full or the property ceases to produce. If the property declines in production one-half, then the judgment will remain for forty some odd years. If the property declines in production three-fourths, or only produces one-fourth of what it now produces, then the judgment will remain on this property for probably eighty years.

The judgment is absolutely void because it is based on speculation, guess and incompetent evidence.

If the property declines in production to the extent so that the respondent would receive $100.00 per month on the judgment or $1,200.00 a year, then it would take 241 years to pay the judgment. We mention this fact to demon-

strate that the judgment is void for uncertainty and is unknown to judicial proceedings. Judgments are defined in law and must be certain and based upon evidence and not speculation or guess. Under the same reasoning as applied to this judgment, a witness could guess or speculate that a cow in her lifetime would produce twenty calves and, therefore, the value of the cow would be equal to twenty-one heads of cattle; or a farm would produce in the next twenty years so many bushels of wheat per year, and in fixing the value of the farm under the reasoning of this case, it should not be fixed on the basis of what the farm would produce in the next twenty years and for what the wheat would sell for, but should be based upon the present market value of the farm. This case presents the same exact logic and reasoning. It is based upon uncertainty, speculation and guess both as to what the farm will produce in oil in the next twenty odd years and the market price of oil during such period.

WE, THEREFORE, most respectfully request this Court to reconsider its Order denying Writ of Certiorari and to rehear this case.

Most respectfully submitted,

JOHN B. OGDEN
1408 Liberty Bank Building
Oklahoma City, Oklahoma

Attorney for Petitioner

March, 1966

CERTIFICATE OF COUNSEL

The foregoing Petition for Rehearing is filed in good faith and not for the purpose of delay.

JOHN B. OGDEN